

WO

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Sean Bernard Runningeagle,

Petitioner,

VS.

Dora Schriro, et al.,

Respondents.

No. CV-98-1903-PHX-PGR

DEATH PENALTY CASE

ORDER RE: PROCEDURAL STATUS OF SENTENCING CLAIMS

Petitioner Sean Runningeagle (“Petitioner”) filed an Amended Petition for Writ of Habeas Corpus alleging that he is imprisoned and sentenced to death in violation of the United States Constitution. (Dkt. 18.)¹ Following the decision in Ring v. Arizona, 536 U.S. 584 (2002), which held that aggravating circumstances that render a defendant death-eligible must be found by a jury, the Court stayed the sentencing-related aspects of Petitioner’s claims while he sought relief from his sentence in state court pursuant to Ring. (Dkt. 79.) In the interim, the Court resolved the procedural status of the conviction-related aspects of Petitioner’s claims. (Dkt. 90.) Following the decision in Summerlin v. Schriro, 124 S.Ct. 2519 (2004), which held that Ring did not apply to cases, such as Petitioner’s, that were final for purposes of direct review at the time Ring was decided, the Court vacated the stay of

1

“Dkt.” refers to the documents in this Court’s file.

Petitioner's sentencing-related claims. (Dkt. 102.) This Order addresses the procedural status of the remaining sentencing-related claims, Claims 1-3, 5, and 8-22.

PROCEDURAL BACKGROUND

In 1988, a jury convicted Petitioner of two counts of first degree murder and the trial court sentenced him to death. (ROA 46, 51-52, 290.)² While his direct appeal was pending before the Arizona Supreme Court, Ariz. Supr. Ct 1, Petitioner filed a *pro se* application for a writ of *coram nobis*, a petition for post-conviction relief ("PCR"), and a supplement to his petition for PCR. (ROA 301; dkt. 21, ex. B, C.) The Arizona Supreme Court stayed Petitioner's direct appeal and revested jurisdiction in the trial court ("PCR court") to resolve the merits of the PCR. (Ariz. Supr. Ct. 19.) The PCR court appointed counsel to represent Petitioner and counsel thereafter filed a Supplemental PCR and a Second Supplemental PCR (Petitioner's *pro se* PCR filings and counsel's supplements are hereafter collectively referred to as "1st PCR"). (Dkt. 21, ex. D, E.) The PCR court summarily denied PCR relief and a subsequent motion for rehearing.³ (Dkt. 21, ex. F, G, H.) The parties thereafter briefed Petitioner's direct appeal claims and his petition for review, which had been consolidated by the Arizona Supreme Court. (Ariz. Supr. Ct. 30, 31.) The Arizona Supreme Court affirmed Petitioner's convictions and sentence and the denial of the 1st PCR. State v. Runnigeagle, 176 Ariz. 59, 61, 859 P.2d 169, 171 (1993). Following its opinion, the court summarily denied Petitioner's motion for reconsideration. (Ariz. Supr. Ct. 45, 47.)

Thereafter, the supreme court issued its mandate before the time in which to seek certiorari to the U.S. Supreme Court had expired, which triggered the filing of a second

² "ROA" refers to four-volumes of state court records prepared for Petitioner's direct appeal and petition for review to the Arizona Supreme Court (Case No. CR-89-0046-AP/PC). "Ariz. Supr. Ct." refers to documents filed with the state supreme court on direct appeal (Case No. CR-89-0046-AP/PC). "RT" refers to the state court reporter's trial transcripts. Certified copies of the state court proceedings were provided to this Court by the Arizona Supreme Court on January 5, 1999. (Dkt. 16.)

³ The court did not rule on the application for writ of *coram nobis*, presumably, as discussed in the Court's prior order, because Arizona had amended its rules to eliminate that avenue for relief in preference to petitions for post-conviction relief. (Dkt. 90 at 11-12.)

1 Notice of PCR on Petitioner's behalf. (Ariz. Supr. Ct. 49, 50.) Subsequently, the supreme
 2 court granted Petitioner's motion to stay its mandate until after the time in which to seek
 3 certiorari had run or certiorari was denied. (Ariz. Supr. Ct. 52.) Further, it vacated the
 4 second Notice of PCR. (*Id.*) Petitioner, *in propria persona*, moved the Arizona Supreme
 5 Court to discharge appointed counsel, John Antineau, and to proceed pro se. (Ariz.Sup.Ct.
 6 53, 54.) The Arizona Supreme Court granted Petitioner's motion. (Ariz.Sup.Ct. 60.) A pro
 7 se writ of certiorari was filed before the U.S. Supreme Court and denied. Runnigeagle v.
 8 Arizona, 510 U.S. 1015 (1993).

9 Thereafter, the Arizona Supreme Court issued its mandate and refiled in the trial court
 10 a second Notice of PCR on Petitioner's behalf. ("2nd PCR") (Ariz.Sup.Ct. 78, 79.)
 11 Petitioner moved and the trial court granted Petitioner's motion to continue to proceed pro
 12 se. (Dkt. 21, ex. Q; ROA 378, 382.) Petitioner did not comply with the deadline for the
 13 filing of a second PCR petition, resulting in the trial court summarily dismissing his 2nd
 14 PCR. (ROA 404.)

15 On May 13, 1994, Petitioner filed a pro se petition for writ of habeas corpus in this
 16 Court, No. CV-94-972-PHX-PGR. This Court appointed counsel, who filed an amended
 17 petition on April 27, 1995. On March 21, 1996, the amended petition was dismissed, without
 18 prejudice, because the petition presented both exhausted and unexhausted claims.

19 Meanwhile, Petitioner initiated a third PCR petition ("3rd PCR"), raising forty claims.
 20 (Dkt. 21, ex. X.) The PCR court dismissed the petition. (Dkt. 21, ex. Y.) Petitioner filed a
 21 motion for rehearing, which was denied. (Dkt. 21, ex. Z, AA.) Petitioner then sought review
 22 in the Arizona Supreme Court, which was denied. (Dkt. 21, ex. BB.)

23 On October 21, 1998, Petitioner commenced the instant action by moving for
 24 appointment of counsel. (Dkt. 1.) The Court appointed counsel and Petitioner filed an
 25 Amended Petition for Writ of Habeas Corpus on April 15, 1999. The Court ordered briefing,
 26 limited to the procedural status of Petitioner's claims.

27 **PRINCIPLES OF EXHAUSTION AND PROCEDURAL DEFAULT**

28 Because this case was filed after April 24, 1996, it is governed by the Antiterrorism

1 and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (“AEDPA”). Lindh v. Murphy,
 2 521 U.S. 320, 336 (1997); Woodford v. Garceau, 538 U.S. 202, 210 (2003). The AEDPA
 3 requires that a writ of habeas corpus not be granted unless it appears that the petitioner has
 4 exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1); see also Coleman v.
 5 Thompson, 501 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509 (1982). To properly
 6 exhaust state remedies, the petitioner must “fairly present” his claims to the state’s highest
 7 court in a procedurally appropriate manner. O’Sullivan v. Boerckel, 526 U.S. 838, 848
 8 (1999).

9 A claim is “fairly presented” if the petitioner has described the operative facts and the
 10 federal legal theory on which his claim is based so that the state courts have a fair
 11 opportunity to apply controlling legal principles to the facts bearing upon his constitutional
 12 claim. Anderson v. Harless, 459 U.S. 4, 6 (1982); Picard v. Connor, 404 U.S. 270, 277-78
 13 (1971).⁴ Commenting on the importance of fair presentation, the United States Supreme
 14 Court has stated:

15 If state courts are to be given the opportunity to correct alleged violations of
 16 prisoners’ federal rights, they must surely be alerted to the fact that the
 17 prisoners are asserting claims under the United States Constitution. If a habeas
 18 petitioner wishes to claim that an evidentiary ruling at a state court trial denied
 him the due process of law guaranteed by the Fourteenth Amendment, he must
 say so, not only in federal court, but in state court.

19 Duncan v. Henry, 513 U.S. 364, 365-66 (1995) (per curiam). Following Duncan, the Ninth
 20 Circuit Court of Appeals has held that a state prisoner has not “fairly presented” (and thus
 21 exhausted) federal claims in state court unless he specifically indicated to that court that the
 22 claims were based on federal law. See, e.g., Lyons v. Crawford, 232 F.3d 666, 669-70
 23 (2000), as amended by 247 F.3d 904 (9th Cir. 2001) (general reference to insufficiency of
 24 evidence, right to be tried by impartial jury and ineffective assistance of counsel lacked the
 25 specificity and explicitness required to present federal claim); Shumway v. Payne, 223 F.3d

26
 27 ⁴ Resolving whether a petitioner has fairly presented his claim to the state court
 28 is an intrinsically federal issue to be determined by the federal court. Wyldes v. Hundley,
 69 F.3d 247, 251 (8th Cir. 1995); Harris v. Champion, 15 F.3d 1538, 1556 (10th Cir. 1994).

1 982, 987-88 (9th Cir. 2000) (broad reference to “due process” insufficient to present federal
2 claim); see also Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999) (“The mere similarity
3 between a claim of state and federal error is insufficient to establish exhaustion.”). A
4 petitioner must make the federal basis of a claim explicit either by citing specific provisions
5 of federal law or federal case law, even if the federal basis of a claim is “self-evident,” Gatlin
6 v. Madding, 189 F.3d 882, 888 (9th Cir. 1999), or by citing state cases that explicitly analyze
7 the same federal constitutional claim, Peterson v. Lampert, 319 F.3d 1153, 1158 (9th Cir.
8 2003) (en banc). Such explicit fair presentation must be made not only to the trial or post-
9 conviction court, but to the state’s highest court. Baldwin v. Reese, 541 U.S. 27, 29 (2004).
10 If a petitioner’s habeas claim includes new factual allegations not presented to the state court,
11 the claim may be considered unexhausted if the new facts “fundamentally alter” the legal
12 claim presented and considered in state court. Vasquez v. Hillery, 474 U.S. 254, 260 (1986).

13 A habeas petitioner’s claims may be precluded from federal review in either of two
14 ways. First, a claim may be procedurally defaulted in federal court if it was actually raised
15 in state court but found by that court to be defaulted on state procedural grounds. Coleman,
16 501 U.S. at 729-30. Second, a claim may be procedurally defaulted if the petitioner failed
17 to present the claim in any forum and “the court to which the petitioner would be required
18 to present his claims in order to meet the exhaustion requirement would now find the claims
19 procedurally barred.” Coleman, 501 U.S. at 735 n.1. This is often referred to as “technical”
20 exhaustion because although the claim was not actually exhausted in state court, the
21 petitioner no longer has an available state remedy. See id. at 732 (“A habeas petitioner who
22 has defaulted his federal claims in state court meets the technical requirements for
23 exhaustion; there are no remedies any longer ‘available’ to him.”); Gray v. Netherland, 518
24 U.S. 152, 161-62 (1996).

25 Rule 32 of the Arizona Rules of Criminal Procedure governs when petitioners may
26 seek relief in post-conviction proceedings and raise federal constitutional challenges to their
27 convictions or sentences in state court. Rule 32.2 provides, in part:

28 a. Preclusion. A defendant shall be precluded from relief under this

1 rule based upon any ground:

2

3 (2) Finally adjudicated on the merits on appeal or in any previous
collateral proceeding;

4 (3) *That has been waived at trial, on appeal, or in any previous*
5 *collateral proceeding.*

6 b. Exceptions. Rule 32.2(a) shall not apply to claims for relief based
7 on Rules 32.1(d), (e), (f), (g) and (h). When a claim under [these sub-sections]
8 is to be raised in a successive or untimely post-conviction relief proceeding,
9 the notice of post-conviction relief must set forth the substance of the specific
10 exception and the reasons for not raising the claim in the previous petition or
11 in a timely manner. If the specific exception and meritorious reasons do not
12 appear substantiating the claim and indicating why the claim was not stated in
13 the previous petition or in a timely manner, the notice shall be summarily
14 dismissed.

15 Ariz. R. Crim. P. 32.2 (West 2003) (emphasis added). Thus, pursuant to Rule 32.2,
16 petitioners may not be granted relief on any claim which could have been raised in a prior
17 petition for post-conviction relief. Only if a claim falls within certain exceptions
18 (subsections (d) through (h) of Rule 32.1) and the petitioner can justify why the claim was
19 omitted from a prior petition or not presented in a timely manner will the preclusive effect
20 of Rule 32.2 be avoided. Ariz. R. Crim. P. 32.2(b), 32.4(a).

21 Therefore, in the present case, if there are claims which have not been raised
22 previously in state court, the Court must determine whether Petitioner has state remedies
23 currently available to him pursuant to Rule 32. If no remedies are currently available,
24 petitioner's claims are "technically" exhausted but procedurally defaulted. Coleman, 501
25 U.S. at 732, 735 n.1. In addition, if there are claims that were fairly presented in state court
26 but found defaulted on state procedural grounds, such claims also will be found procedurally
27 defaulted in federal court so long as the state procedural bar was independent of federal law
28 and adequate to warrant preclusion of federal review. Harris v. Reed, 489 U.S. 255, 262
(1989). A state procedural default is not independent if, for example, it depends upon an
antecedent federal constitutional ruling. See Stewart v. Smith, 536 U.S. 856 (2002) (per
curiam). A state bar is not adequate unless it was firmly established and regularly followed
at the time of application by the state court. Ford v. Georgia, 498 U.S. 411, 423-24 (1991).

1 Because the doctrine of procedural default is based on comity, not jurisdiction, federal
2 courts retain the power to consider the merits of procedurally defaulted claims. Reed v.
3 Ross, 468 U.S. 1, 9 (1984). As a general matter, the Court will not review the merits of
4 procedurally defaulted claims unless a petitioner demonstrates legitimate cause for the failure
5 to properly exhaust in state court and prejudice from the alleged constitutional violation, or
6 shows that a fundamental miscarriage of justice would result if the claim were not heard on
7 the merits in federal court. Coleman, 501 U.S. at 735 n.1.

8 Ordinarily “cause” to excuse a default exists if a petitioner can demonstrate that “some
9 objective factor external to the defense impeded counsel’s efforts to comply with the State’s
10 procedural rule.” Id. at 753. Objective factors which constitute cause include interference
11 by officials which makes compliance with the state’s procedural rule impracticable, a
12 showing that the factual or legal basis for a claim was not reasonably available to counsel,
13 and constitutionally ineffective assistance of counsel. Murray v. Carrier, 477 U.S. 478, 488
14 (1986). “Prejudice” is actual harm resulting from the alleged constitutional error or violation.
15 Magby v. Wawrzaszek, 741 F.2d 240, 244 (9th Cir. 1984). To establish prejudice resulting
16 from a procedural default, a habeas petitioner bears the burden of showing not merely that
17 the errors at his trial constituted a possibility of prejudice, but that they worked to his actual
18 and substantial disadvantage, infecting his entire trial with errors of constitutional dimension.
19 United States v. Frady, 456 U.S. 152, 170 (1982).

20 If a petitioner cannot meet the cause and prejudice standard, the Court still may hear
21 the merits of procedurally defaulted claims if the failure to hear the claims would constitute
22 a “fundamental miscarriage of justice.” Sawyer v. Whitley, 505 U.S. 333 (1992). The
23 “fundamental miscarriage of justice” exception is also known as the actual or procedural
24 innocence exception. There are two types of claims recognized under this exception: (1) that
25 a petitioner is “innocent of the death sentence,” or, in other words, that the death sentence
26 was erroneously imposed; and (2) that a petitioner is innocent of the capital crime. In the
27 first instance, the petitioner must show by clear and convincing evidence that, but for a
28 constitutional error, no reasonable factfinder would have found the existence of any

aggravating circumstance or some other condition of eligibility for the death sentence under the applicable state law. Id. at 336. In the second instance, the petitioner must show that “a constitutional violation has probably resulted in the conviction of one who is actually innocent.” Schlup v. Delo, 513 U.S. 298, 327 (1995). To establish the requisite probability, the petitioner must show that “it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.” Id. Furthermore:

[A] substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare. . . . To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.

Id. at 324.

DISCUSSION

Respondents concede that Claims 8, 9, 10 (in part) and 20 are exhausted. However, Respondents contest exhaustion regarding the remaining claims, which are discussed below.

I. Fifth Amendment Due Process Claims

With respect to claims alleging that his due process rights under the 5th Amendment were violated, it is the 14th Amendment, not the 5th Amendment that protects a person against deprivations of due process by a state. See U.S. Const. amend. XIV, § 1 (“nor shall any state deprive any person of life, liberty, or property without due process of law”); Castillo v. McFadden, 399 F.3d 993, 1002 n.5 (9th Cir. 2005) (“The Fifth Amendment prohibits the federal government from depriving persons of due process, while the Fourteenth Amendment explicitly prohibits deprivations without due process by the several States.”). Regardless of any concession by Respondents concerning exhaustion, because the 5th Amendment Due Process Clause does not provide a cognizable ground for relief regarding Petitioner’s state court conviction, the allegations that the 5th Amendment Due Process Clause was violated will be dismissed; it will not be discussed below with respect to the individual claims.

II. Individual Claims

CLAIM 1: Ineffective Assistance of Counsel at Trial

The Court previously deferred ruling on the sentencing-related aspects of Claims 1-A through 1-C, which allege that Petitioner received ineffective assistance of counsel (“IAC”) at sentencing. (See dkt. 90 at 1 n.2; 18 at 20-26.) Petitioner asserts that he exhausted these claims in his application for *coram nobis* and in his 1st PCR. (Dkt. 21, ex. B-D.) The Court previously rejected that argument in connection with the conviction-related aspects of these claims. (Dkt. 90 at 11-12.) For the same reasons, the Court finds that the sentencing-related aspects of these claims were not exhausted by presentation in an application for *coram nobis* or the 1st PCR. (See dkt. 90 at 11-17.)

Petitioner did fairly present Claims 1-A thru 1-C in his 3rd PCR. (See dkt. 90 at 13, n.10.) The PCR court concluded that Claims 1-A thru 1-C were procedurally defaulted as waived pursuant to Ariz. R. Crim. P. 32.2(a)(3). (See id.) The state supreme court summarily denied review of the 3rd PCR. (Ariz.Sup.Ct. 84.) Because the Court looks through the state supreme court’s denial of review to the PCR court’s ruling and that court found the claims precluded pursuant to an adequate and independent state bar, federal review of the sentencing aspects of these claims is foreclosed unless Petitioner can demonstrate cause and prejudice or a fundamental miscarriage of justice (“FMJ”).

Petitioner argues that cause and prejudice and/or FMJ exist on the same grounds urged in connection with the conviction-related aspects of these claims. The Court previously determined that those grounds were insufficient to establish either cause and prejudice or FMJ to excuse procedural default of the conviction-related aspects of these claims. (Dkt. 90 at 17-19.) That determination applies equally to the sentencing-related aspects of these claims. Accordingly, the sentencing aspects of these claims will be dismissed as procedurally barred.

CLAIM 2: Alleged Brady Violation

Petitioner alleges that he suffered a violation of Brady v. Maryland, 373 U.S. 83 (1963), when the State failed to disclose exculpatory evidence consisting of statements made by a jailhouse witness, Manuel Melendez, in violation of Petitioner’s rights under the 1st,

1 6th, 8th and 14th Amendments. Petitioner raised Claim 2 in his 3rd PCR as claim 4. (See
2 Dkt. 21, ex. X at 36.) Respondents contend that the trial court found Claim 2 procedurally
3 defaulted pursuant to Rule 32.2(a)(3). (Dkt. 21 at 33.)

4 This Court previously explained that Claim 2 was resolved on the merits during
5 Petitioner's 3rd PCR proceeding. (Dkt. 90 at 19-20.) Accordingly, Claim 2 is exhausted and
6 will be reviewed on the merits regarding both its conviction-related and sentencing-related
7 aspects.

8 **CLAIM 3: Admission of Alleged Involuntary Statements**

9 Claim 3 alleges that the trial court's refusal to suppress statements Petitioner made to
10 investigating officers violated his rights to a fair trial, to confront witnesses against him, to
11 compulsory process and to due process and equal protection under the 1st, 6th, 8th and 14th
12 Amendments. (Dkt. 18 at 51.)

13 The Court previously determined that the conviction-related aspects this claim had not
14 been properly exhausted on direct appeal by virtue of the supreme court's fundamental error
15 review where this claim was not raised on direct appeal. (Dkt. 90 at 20-22.) For the same
16 reasons, the Court concludes that the sentencing-related aspects were not exhausted by virtue
17 of the supreme court's fundamental error review. (Id.)

18 Although Petitioner fairly presented this claim in his 3rd PCR, the PCR court found
19 the claim procedurally defaulted as waived pursuant to Rule 32.2(a)(3). (Id. at 21, citing dkt.
20 21, ex. Y.) Therefore, unless Petitioner can demonstrate cause and prejudice or FMJ to
21 excuse the default, federal review of this claim is procedurally barred. Petitioner relies on
22 the same grounds to establish cause and prejudice and FMJ previously determined to be
23 insufficient by the Court. (Dkt. 90 at 22.) Accordingly, the Court finds the sentencing-
24 related aspects of this claim procedurally barred.

25 **CLAIM 5: Fisher Agreement**

26 Petitioner contends that his constitutional right to a fair sentencing hearing was
27 violated by co-defendant Orva Antone testifying at trial pursuant to a consistency agreement
28 whereby Antone agreed to testify consistent with written statements he had previously

1 provided to investigating officers. (Dkt. 18 at 56.) Petitioner argues that the consistency
2 agreement required Antone to implicate him rather than simply tell the truth in violation of
3 his rights under the 1st, 6th, 8th and 14th Amendments. (Id. at 57.)

4 Petitioner first presented this claim in his 3rd PCR. However, the PCR court found
5 it procedurally defaulted as waived pursuant to Rule 32.2(a)(3). Because the sentencing-
6 related aspects of this claim were procedurally defaulted in state court, federal review of
7 these aspects of this claim will be barred absent a showing of cause and prejudice or FMJ.
8 Because the sentencing-related aspects of this claim were procedurally defaulted in state
9 court, federal review of these aspects of this claim will be barred absent a showing of cause
10 and prejudice or FMJ. Petitioner relies on the same grounds to establish cause and prejudice
11 and FMJ previously determined by the Court to be insufficient. (See dkt. 90 at 17-19.)
12 Accordingly, the Court finds the sentencing-related aspects of this claim procedurally barred.

13 **CLAIM 10: Failure to Appropriately Weigh All Mitigation**

14 Claim 10 alleges the trial court failed to consider and give effect to all of the
15 mitigation presented at sentencing and that the Arizona Supreme Court did not cure that
16 failure in violation of Petitioner's 1st, 6th, 8th and 14th Amendments. (Dkt. 18 at 70-73.)
17 Specifically, Petitioner alleges that the state courts failed to consider his psychological
18 history and status, intoxication, troubled family, love and support of his family and friends,
19 employment history, intelligence, his caring attitude toward family and friends, non-violent
20 background, and the more lenient sentence received by co-defendant Antone. (Id. at 70-71.)
21 Petitioner asserts that the claim was fairly presented on direct appeal, or otherwise exhausted
22 by virtue of the supreme court's independent sentencing review, and that it was fairly
23 presented in his 3rd PCR. (Id. at 73.) Respondents concede that Petitioner exhausted the
24 allegation that the trial court failed to consider and give effect to Petitioner's psychological
25 history and status in violation of his 8th and 14th Amendment rights on direct appeal. (Dkt.
26 21 at 27, 41.) The Court agrees and finds that portion of this claim exhausted. Respondents
27 contend that the balance of the claim was not exhausted on direct appeal or by virtue of the
28 supreme court's independent sentencing review and that the PCR court found the balance of

1 the claim procedurally defaulted. (Id.)

2 The Arizona Supreme Court, through its jurisprudence, has repeatedly stated that it
3 independently reviews each capital case to determine whether the death sentence is
4 appropriate. In State v. Gretzler, 135 Ariz. 42, 54, 659 P.2d 1, 13 (1983), the court stated
5 that the purpose of independent review is to assess the presence or absence of aggravating
6 and mitigating circumstances and the weight to give to each. See also State v. Blazak, 131
7 Ariz. 598, 604, 643 P.2d 694, 700 (1982). To ensure compliance with Arizona's death
8 penalty statute, the supreme court reviews the record regarding aggravation and mitigation
9 findings, and then decides independently whether the death sentence should be imposed.
10 State v. Brewer, 170 Ariz. 486, 493-94, 826 P.2d 783, 790-91 (1992).

11 The Court initially concludes that Petitioner's allegation that the state supreme court
12 violated his constitutional rights by failing to cure the alleged trial court error could not have
13 been exhausted by virtue of its independent sentencing review. It is during that review that
14 the error was alleged to have occurred. To give the state's highest court the opportunity to
15 rule on a claim of error arising during the direct appeal, the proper method was to present the
16 allegation in a motion for reconsideration with the Arizona Supreme Court. See Ariz. R.
17 Crim. P. 31.18(b) ("Any party desiring reconsideration of a decision of an appellate court
18 may file a motion for reconsideration in the appellate court within fifteen days after the filing
19 of a decision by the appellate court."); Moormann v. Schriro, 426 F.3d 1044, 1058 (9th Cir.
20 2005) (holding that the Arizona Supreme Court's independent sentencing review did not
21 exhaust claim alleging that the supreme court failed to cure alleged trial court error in the
22 consideration and evaluation of aggravating and mitigating evidence; the proper method to
23 present such claims is in a motion for reconsideration); Correll v. Stewart, 137 F.3d 1404,
24 1418 (9th Cir. 1998) (same). Although Petitioner filed a motion for the court to reconsider
25 its decision on direct appeal, he did not raise any issue related to the Arizona Supreme
26 Court's independent sentencing review of his mitigation evidence. (See Ariz. Supr. Ct. 45.)
27 Rather, he did not raise the supreme court error aspect of Claim 10 until his 3rd PCR, and the
28 PCR court found this aspect of Claim 10 procedurally defaulted as waived pursuant to Rule

32.2(a)(3). (Dkt. 21, ex. Y.) This contention is procedurally defaulted. Petitioner argues that cause and prejudice or FMJ excuses the default. The Court disagrees. Petitioner relies on arguments previously found insufficient by this Court to establish cause and prejudice and FMJ. (See dkt. 90 at 17-19.) Therefore, the Court finds this portion of this claim procedurally barred.

The Court further concludes that the balance of Petitioner's arguments regarding mitigation was not presented on direct appeal. (See Opening Br. at 22.) In his 3rd PCR, Petitioner did fairly present his trial court error claim. Except for the psychological history mitigation, the PCR court found the balance of Claim 10 procedurally defaulted pursuant to Rule 32.2(a)(3). However, the Court must still consider whether the Arizona Supreme Court's independent review exhausted Petitioner's remaining allegations. Whether such independent review exhausts a federal constitutional challenge to the trial court's alleged failure to consider and weigh specific mitigation evidence is an open question in the Ninth Circuit. Cf. Beaty, 303 F.3d 975, 987 (9th Cir. 2002). Rather than resolve the more difficult procedural issue, the Court finds it judicially expedient under the AEDPA to summarily reach and deny the merits of Claim 10's trial error aspect under the 8th and 14th Amendment.

Petitioner argues that the Arizona Supreme Court's denial of relief on the exhausted and arguably exhausted portions of this claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]" 28 U.S.C. § 2254(d)(1) (Supp. 2004). To assess a habeas claim under § 2254(d)(1), the Court must first identify the "clearly established Federal law," if any, that governs the sufficiency of the claims on habeas review. "Clearly established" federal law includes the holdings of the Supreme Court at the time the petitioner's state court conviction became final.⁵ See Williams v. Taylor, 529 U.S. 362, 365

⁵ The Supreme Court's analysis of whether a claim is based on "clearly established" federal law under § 2254(d)(1) is related to the standard set out in Teague v. Lane, 489 U.S. 288 (1989). That is, Supreme Court precedent which would qualify as an

(2000). Habeas relief cannot be granted if the Supreme Court has not “broken sufficient legal ground” on a constitutional principle advanced by a petitioner, even if lower federal courts have decided the issue. See id. at 381. However, Ninth Circuit law may still be considered “for its persuasive authority in applying Supreme Court law.” Van Tran v. Lindsey, 212 F.3d 1143, 1154 (9th Cir. 2000), overruled on another ground by Lockyer v. Andrade, 538 U.S. 63 (2003); Clark v. Murphy, 331 F.3d 1062, 1069 (9th Cir.), cert. denied, 540 U.S. 968 (2003).

A state court decision is “contrary to” clearly established federal law if it fails to apply the correct controlling Supreme Court authority, or if it applied the correct authority to a case involving facts materially indistinguishable from those in a controlling Supreme Court case, but nonetheless reached a different result. Id. at 413; see also Andrade, 538 U.S. at 72. Whether a state court’s interpretation of federal law is contrary to Supreme Court authority, as opposed to an unreasonable application thereof, is a question of federal law to which federal courts owe no deference to the state courts. Cordova v. Baca, 346 F.3d 924, 929-30 (9th Cir. 2003).

A state court decision amounts to an “unreasonable application” under § 2254(d)(1) if the state court correctly identifies the governing “clearly established” legal principle from the Supreme Court’s decisions, but then makes an objectively unreasonable application of that principle to the facts of the petitioner’s case. See Andrade, 538 U.S. at 75. An “objectively unreasonable” application of federal law involves more than an incorrect or even clearly erroneous application of federal law. See Williams, 529 U.S. at 410-11 (“[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.”) In contrast to the “contrary to” prong of § 2254(d)(1), the AEDPA mandates deferential review of a state

“old rule” under Teague would necessarily be “clearly established” federal law under § 2254(d)(1). See Teague, 489 U.S. at 301.

1 court's application of clearly established Supreme Court precedent. See Woodford v.
 2 Visciotti, 537 U.S. 19, 24 (2002) (citing Lindh v. Murphy, 521 U.S. 320, 333 n.7 (1997)).

3 In considering a challenge under either the "contrary to" or "unreasonable
 4 application" prong of subsection (d)(1), state court factual determinations are presumed
 5 correct pursuant to § 2254(e)(1) and can be rebutted only by clear and convincing evidence.
 6 See Taylor v. Maddox, 366 F.3d 992, 1000 (9th Cir.), cert. denied 125 S.Ct. 809 (2004).

7 The clearly established Supreme Court law regarding consideration of mitigation is
 8 set forth in Lockett v. Ohio and Eddings v. Oklahoma, which hold that "the Eighth and
 9 Fourteenth Amendments require that the sentencer . . . not be precluded from considering,
 10 *as a mitigating factor*, any aspect of a defendant's character or record and any of the
 11 circumstances of the offense that the defendant proffers as a basis for a sentence less than
 12 death." Eddings, 455 U.S. 104, 110 (1982) (quoting Lockett, 438 U.S. 586, 604 (1978)).
 13 The Constitution and the clearly established law require only that the sentencing court hear
 14 and consider all mitigation evidence, but the court may determine the *weight* to accord such
 15 evidence. Id. at 114-15. In assessing Petitioner's claim for habeas relief, the Court does not
 16 evaluate the substance of each and every piece of evidence submitted as mitigation. See
 17 Jeffers v. Lewis, 38 F.3d 411, 418 (9th Cir. 1994) (en banc) (holding that when it is evident
 18 that all mitigating evidence was considered, trial court is not required to discuss each piece
 19 of such evidence). Rather, the Court assesses whether the state court's consideration of all
 20 proffered mitigation evidence, was contrary to or an unreasonable application of the
 21 principles set forth in Lockett and Eddings.

22 At sentencing, the trial court specifically indicated that it had considered all of the
 23 evidence presented in mitigation:

24 The Court has considered all relevant evidence, testing, statements, reports,
 25 etc., presented on behalf of defendant[. . . The constitutional requirement to
 26 an individual determination in a capital case, requires . . . that I consider all
 27 relevant mitigating factors . . . The Court has considered all the evidence,
 28 testimony, letters on behalf of defendant Runningeagle, and psychologists
 reports prepared and proffered as mitigation in this case.

(ROA 91 at 3, 4, 8.) Further, it specifically detailed its consideration of Petitioner's alleged

1 alcohol abuse the day of the crime, his psychological history, and the testimony and letters
 2 from family and friends, which described Petitioner's family history and support, and his
 3 educational, social and employment history. (ROA 86; RT 12/9/88 at 28-111, RT 1/13/89 at
 4 22-85.) The trial court also indicated that it had considered the presentence report, which
 5 contained information regarding Petitioner's social and educational history as well as
 6 psychological test results and reports. (ROA 82-84, 91.) Further, the trial court was fully
 7 aware of Antone's plea agreement and sentence of probation, because Antone had been
 8 sentenced by the same court. (ROA 82A, 84.)

9 This Court must assess whether that determination was either "contrary to" or "an
 10 unreasonable application" of the principles set forth in Lockett and Eddings. The Court
 11 concludes that the supreme court's affirmance of the sentence was neither contrary to or an
 12 unreasonable application of Lockett and Eddings. A state trial court need not exhaustively
 13 analyze each mitigating factor so long as a reviewing federal court can discern from the
 14 record that it considered all proffered mitigation. Moormann, 426 F.3d at 1055. Further, a
 15 court may rely on a sentencing court's explicit statement that it considered all proffered
 16 mitigation. Id. The trial court in this case explicitly stated that it considered all of the
 17 proffered mitigation and the supreme court implicitly relied on that statement. Therefore,
 18 this Court finds that the state court's denial of relief on this claim was neither contrary to nor
 19 an unreasonable application of clearly established federal law. Accordingly, the Court will
 20 deny the exhausted or arguably exhausted portions of this claim on the merits.

21 **CLAIM 11: Victim Impact Statements**

22 **CLAIM 12: Disproportionate Sentence of Death**

23 **CLAIM 13: Inadequate Direct Appeal Appellate Review**

24 In Claim 11, Petitioner argues that the trial court's admission of irrelevant victim
 25 impact statements at sentencing violated his rights under the 6th, 8th and 14th Amendments.
 26 (Dkt. 18 at 73-76.) In Claim 12, Petitioner alleges that imposition of the death penalty
 27 against him constitutes a disproportionate and excessive sentence in violation of the 8th and
 28 14th Amendment. (Id. at 76-78.) In Claim 13, Petitioner alleges that the Arizona Supreme
 Court's review of his direct appeal was inadequate and constitutes a violation of the 8th and

14th Amendment. (Id. at 78-79.) Petitioner concedes that he did not raise these claims on direct appeal, id. at 76-78, but contends that Claims 11 and 12 were exhausted by virtue of the Arizona Supreme Court's fundamental error review or that he fairly presented these claims, as well as Claim 13, in his 3rd PCR. (Id. at 78-79.)

The Court rejects the contention that Claims 11 and 12 were exhausted by virtue of the supreme court's fundamental error review where he did not raise these issues on appeal for the reasons discussed in its previous order. (See dkt. 90 at 20-21.) Further, although Petitioner fairly presented Claims 11, 12 and 13 in his 3rd PCR, dkt. 21 at 42-43, the PCR court found them procedurally defaulted as waived pursuant to Rule 32.2(a)(3). (Id., ex. Y at 1-2.) Because these claims were procedurally defaulted in state court, this Court may not consider them on the merits unless Petitioner can demonstrate cause and prejudice or FMJ.

The Court rejects Petitioner's cause and prejudice arguments. Nothing prevented Petitioner's counsel from raising these claims on direct appeal. Petitioner's argument to the contrary does not have merit. (See dkt. 44 at 44-45; dkt. 90 at 17-19.) Petitioner has not established that a fundamental miscarriage of justice will occur if Claim 11, 12 or 13 is not heard on the merits. (See dkt. 44 at 34-35; dkt. 90 at 19.) Claims 11, 12 and 13 are procedurally barred.

CLAIM 14: Methods of Execution

In Claim 14, Petitioner raises the following method of execution claims regarding execution by lethal gas and execution by lethal injection:

- (a) Execution by lethal gas will violate his 8th and 14th Amendment rights;
- (b) Execution by lethal injection will violate his 8th and 14th Amendment rights;
- (c) Altering the statutory means of execution and requiring choice of method of execution violates the Ex Post Facto Clause of the U.S. Constitution, Art. 1, § 10, cl. 1;
- (d) Requiring him to choose his method of execution violates his 8th and 14th Amendment rights;
- (e) Execution in a manner not authorized by law at the time of his sentencing violates the 8th and 14th Amendment.

(Dkt. 18 at 79-89.)

1 Petitioner alleges that he exhausted Claim 14 in his 3rd PCR. (Dkt. 18 at 89.)
2 However, while fairly presented in his 3rd PCR, the PCR court found Claim 14 procedurally
3 defaulted as waived pursuant to Rule 32.2(a)(3). (Dkt. 21, ex. Y.) Because these claims
4 were found procedurally defaulted in state court pursuant to Rule 32.2(a)(3), federal review
5 is barred unless Petitioner can demonstrate cause and prejudice or FMJ. Petitioner relies on
6 the same cause and prejudice and FMJ arguments previously found insufficient by the Court.
7 (See dkt. 90 at 17-19.) Accordingly, Claim 14 is procedurally barred.

8 **CLAIM 15: Ineffective Assistance of Appellate Counsel**

9 Petitioner argues that he received IAC during his direct appeal and during state post-
10 conviction proceedings in violation of his rights under the 1st, 6th, 8th and 14th
11 Amendments. (Dkt. 18 at 89.)

12 The Court previously found, in connection with the conviction-related aspects of this
13 claim, that post-conviction IAC is not a cognizable habeas claim. (Dkt. 90 at 26.) That
14 conclusion applies equally to the sentencing-related aspects of this claim; therefore, the claim
15 will be dismissed as not cognizable to that extent. Although Petitioner presented the
16 appellate IAC portion of this claim in his 3rd PCR, dkt. 90 at 26, the PCR court found the
17 claim procedurally defaulted as waived pursuant to Rule 32.2(a)(3). (Dkt. 21, ex. Y.)
18 Therefore, federal review on the merits of this claim is procedurally barred unless Petitioner
19 can establish cause and prejudice or FMJ. Petitioner relies on the same arguments to
20 establish cause and prejudice and FMJ that the Court previously found insufficient. (See dkt.
21 90 at 26-27.) Accordingly, the Court finds the sentencing-related aspects of this claim not
22 cognizable in part and procedurally barred in part.

23 **CLAIM 16: Trial Counsel's Motion to Withdraw Prior to Sentencing**

24 Claim 16 alleges the trial court improperly denied a motion to withdraw filed by
25 Petitioner's trial counsel prior to sentencing in violation of Petitioner's 14th Amendment
26 rights. (Dkt. 18 at 90-95.) Petitioner first presented this claim in letters to, and in a petition
27 for writ of mandamus filed with, the trial court, which were part of the trial record on direct
28 appeal. (Dkt. 44 at 45-46.) Petitioner contends this claim was exhausted by virtue of the

1 supreme court's fundamental error review. (Id. at 46.) The Court rejects that contention
 2 where the claim was not raised on direct appeal for the reasons discussed in its previous
 3 order. (See dkt. 90 at 20-21.)

4 Petitioner did fairly present Claim 16 in his 3rd PCR. The PCR court concluded that
 5 Claim 16 was procedurally defaulted as waived pursuant to Ariz. R. Crim. P. 32.2(a)(3).
 6 (See dkt. 21, ex. Y at 1.) Pursuant to Rule 32.2(a)(3), the Court concludes that Claim 16 was
 7 procedurally defaulted in state court. Absent further cause and prejudice or miscarriage of
 8 justice argument, Claim 16 is procedurally barred.

9 **CLAIM 17: Ineffective Assistance of Trial Counsel at Sentencing**

10 Claim 17 alleges IAC at sentencing in violation of Petitioner's 6th and 14th
 11 Amendment rights. (Dkt. 18 at 95-130.) Petitioner contends that he exhausted this claim by
 12 presenting it in his 1st and 3rd PCR. Petitioner did not include Claim 17 in his 1st PCR or
 13 in his direct appeal; therefore, he did not fairly present this claim. (See dkt. 21, ex. A-E.)
 14 Further, while Petitioner fairly presented this claim in his 3rd PCR, the PCR court found it
 15 procedurally defaulted as waived pursuant to Rule 32.2(a)(3). (Id., ex. Y.) Therefore, federal
 16 review on the merits of this claim is procedurally barred unless Petitioner can establish cause
 17 and prejudice or FMJ. Petitioner relies on the same arguments previously rejected by the
 18 Court to establish cause and prejudice and FMJ. (See dkt. 90 at 17-19.) Accordingly, the
 19 Court finds this claim procedurally barred.

20 **CLAIMS 18: The Trial Court Improperly Held a Joint Penalty Hearing**

21 Claim 18 alleges that the trial court improperly held a joint penalty hearing for
 22 Petitioner and co-defendant, Corey Tilden, in violation of Petitioner's 8th and 14th
 23 Amendment rights. (Dkt. 18 at 130-33.) Petitioner asserts that this claim was exhausted on
 24 direct appeal by virtue of the Arizona Supreme Court's fundamental error review and that
 25 he also fairly presented it in his 1st and 3rd PCR. (Dkt. 44 at 46.) The Court rejects the
 26 contention that this claim was exhausted by virtue of the supreme court's fundamental error
 27 review where it was never raised on direct appeal for the reasons discussed in its previous
 28 order. (See dkt. 90 at 20-21.) Further, Petitioner did not include Claim 18 in his 1st PCR;

1 therefore, he did not fairly present this claim in his 1st PCR. (See dkt. 21, ex. A-E.) While
 2 Petitioner fairly presented Claim 18 in his 3rd PCR, see dkt. 21 at 48-49, the PCR court
 3 concluded that it was procedurally defaulted as waived pursuant to Rule 32.2(a)(3). (See id.,
 4 ex. Y at 1.) Therefore, federal review of Claim 18 is procedurally barred unless Petitioner
 5 can establish cause and prejudice or FMJ. Petitioner relies on the same arguments previously
 6 rejected as insufficient by the Court to establish cause and prejudice and FMJ. (See dkt. 90
 7 at 17-19.) Accordingly, the Court concludes that Claim 18 is procedurally barred.

8 **CLAIM 19: IAC Based on Counsel's Failure to Request a Separate Penalty**
 9 **Hearing**

10 Claim 19 alleges IAC at sentencing based on counsel's failure to request a separate
 11 sentencing hearing in violation of the 6th and 14th Amendments. (Dkt. 18 at 133-34.)
 12 Petitioner alleges that he exhausted Claim 19 in his 1st PCR. The Court concludes that
 13 Petitioner did fairly present Claim 19 in his 1st PCR proceeding. (See dkt. 21, ex. D. at 3,
 14 id., ex. G at 1-2 and Ariz.Sup.Ct. 30.) Moreover, Respondents conceded that Petitioner fairly
 15 presented this issue in the context of his trial. (See dkt. 21 at 27; dkt. 90 at 11.) Claim 19
 16 will be reviewed on the merits.

17 **CLAIM 21: Pecuniary Gain Aggravating Circumstance Fails to Adequately**
 18 **Narrow Class of Persons Eligible for Death Penalty, both Facially**
 19 **and as Applied to the Facts of this Case.**

20 Petitioner alleges that Arizona's construction of the pecuniary gain aggravating
 21 circumstance fails to adequately narrow the class of persons eligible for the death penalty,
 22 facially and as applied, in violation of Petitioner's 8th and 14th Amendment rights.⁶ (Dkt.
 23 18 at 135-38.) On direct appeal, Petitioner only presented an "as applied" challenge to the
 24 pecuniary gain aggravating circumstance. (See dkt. 21, ex. A at 12-19.) Therefore, the "as
 25 applied" aspect will be reviewed on the merits. Petitioner first presented the facial challenge

26 ⁶ Respondents argue that this claim only presents a facial challenge to Arizona's death
 27 penalty statute. (Dkt. 21 at 49.) However, the Court concludes that Claim 21 presents both
 28 a facial and an as applied challenge to the pecuniary gain aggravating circumstance. (See
 dkt. 18 at 135.)

1 in his 3rd PCR, see dkt. 21 at 48-49, but the PCR court found that aspect of the claim
 2 procedurally defaulted as waived pursuant to Rule 32.2(a)(3). (See id., ex. Y at 1.) Federal
 3 review of the facial challenge is procedurally barred unless Petitioner can establish cause and
 4 prejudice or FMJ. Petitioner relies on arguments previously rejected by the Court as
 5 insufficient to establish cause and prejudice and FMJ. (See dkt. 90 at 26-27.) Therefore, the
 6 Court finds that Petitioner has not established cause and prejudice to excuse the procedural
 7 default of the facial aspect of this claim and it is procedurally barred. The “as applied”
 8 aspect of this claim will be reviewed on the merits.

9 **CLAIM 22 Arizona Death Penalty Scheme is Unconstitutional**

10 In Claim 22, Petitioner alleges that the Arizona death penalty statute:

- 11 (a) fails to narrowly define the class of death-eligible individuals in violation of
 12 the 8th and 14th Amendments;
- 13 (b) fails to ensure that the death penalty is not imposed arbitrarily in violation of
 14 the 8th and 14th Amendments;
- 15 (c) is applied in such a manner that it discriminates against males, the young,
 16 minorities and the poor in violation of the 8th and 14th Amendments;
- 17 (d) denies defendants the right to a jury trial in the sentencing phase in violation
 18 of the 6th and 14th Amendments;
- 19 (e) creates an impermissible statutory presumption in favor of the imposition of
 20 a death sentence in violation of the 8th and 14th Amendments;
- 21 (f) improperly places the burden on a defendant to prove the existence of
 22 mitigating circumstances in violation of the 8th and 14th Amendments;
- 23 (g) mandates the imposition of a death sentence where the court finds that the
 24 aggravating circumstances outweigh the mitigating circumstances in violation
 25 of the 8th and 14th Amendments;
- 26 (h) fails to require the sentencer to determine, beyond a reasonable doubt, that the
 27 death sentence is the appropriate punishment in violation of the 8th and 14th
 28 Amendments;
- 29 (i) gives the prosecution unfettered discretion in determining whether to seek the
 death penalty in violation of the 14th Amendment; and
- 30 (j) fails to ensure that the death penalty is not imposed arbitrarily or
 discriminatorily by providing for proportionality review in violation of the 8th
 and 14th Amendments.

(Dkt. 18 at 138-146.) Petitioner did not fairly present Claim 22 during his direct appeal or

during his 1st PCR proceeding. (See dkt. 21, ex. A, G.); therefore, he did not exhaust this claim either during direct appeal or during his 1st PCR. (See dkt. 90 at 13, 15-16.) Although Petitioner fairly presented this claim in his 3rd PCR, dkt. 44 at 46, the PCR court found it procedurally defaulted as waived pursuant to Rule 32.2(a)(3). (Dkt. 21, ex. Y at 1.) Because this claim was found procedurally defaulted by the state court, federal review on the merits is procedurally barred unless Petitioner establishes cause and prejudice or FMJ. Petitioner relies on arguments previously found insufficient by this Court to establish cause and prejudice and FMJ. (See dkt. 90 at 17-19.) Therefore, the Court finds this claim procedurally barred.

CONCLUSION

The Court concludes that Claims 1A thru 1-C, 3, 5, 10-18, 21 and 22 are procedurally barred and will be dismissed. The Court further concludes that Claim 10 is without merit. Claims 2, 8, 9, 19 and 20 will be briefed on the merits and addressed in a future order.

Accordingly,

IT IS HEREBY ORDERED that the following claims are **DISMISSED WITH PREJUDICE**: Claims 1-A thru 1-C, 3, 5, 10-18, 21 and 22 are procedurally barred; Claim 10 is denied as meritless.

IT IS FURTHER ORDERED that, no later than forty-five (45) days following entry of this Order, Petitioner shall file a memorandum regarding the merits of Claims 2, 8, 9, 19 and 20 (“Merits Brief RE: Sentencing Claims”). The Merits Brief RE: Sentencing Claims shall specifically identify and apply appropriate AEDPA standards of review as to *each claim for relief*, not simply restate facts and argument contained in the Amended Petition. Petitioner shall also identify in the Merits Brief RE: Sentencing Claims: (1) each claim for which further evidentiary development is sought; (2) the facts or evidence sought to be discovered, expanded or presented at an evidentiary hearing; (3) why such evidence was not developed in state court; and (4) why the failure to develop the claim in state court was not the result of lack of diligence, in accordance with the Supreme Court’s decision in Williams v. Taylor, 529 U.S. 420 (2000).

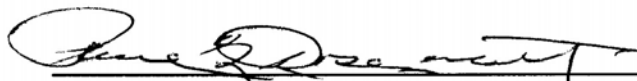
1 **IT IS FURTHER ORDERED** that, no later than forty-five (45) days following the
2 filing of the Merits Brief RE: Sentencing Claims, Respondents shall file a Response (“Merits
3 Response RE: Sentencing Claims”).

4 **IT IS FURTHER ORDERED** that no later than thirty (30) days following the filing
5 of Respondents’ Merits Response RE: Sentencing Claims, Petitioner may file a Merits Reply
6 RE: Sentencing Claims.

7 **IT IS FURTHER ORDERED** that if, pursuant to LRCiv 7.2(g), Petitioner or
8 Respondents file a Motion for Reconsideration of this Order, such motion shall be filed
9 within fifteen (15) days of the filing of this Order. The filing and disposition of such motion
10 shall not toll the time for the filing of the Merits Brief, Response or Reply as scheduled in
11 this Order.

12 **IT IS FURTHER ORDERED** that the Clerk of Court forward a courtesy copy of this
13 Order to the Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, Arizona
14 85007-3329.

15 DATED this 10th day of March, 2006.

16
17
18 
19 Paul G. Rosenblatt
 United States District Judge